UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THIRTIETH REGION

Milwaukee, Wisconsin

CUSTOM MECHANICAL STRUCTURES, INC.[1]

Employer

and **Case 30-RC-6482**

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL #18, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended ("Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("Board").

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[2]

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time fabricators, welders, plumbers, electricians, siders, and painters, but excluding temporary employees, office and clerical employees, sales and managerial employees, guards and supervisors as defined in the Act.[3]

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[1]The name of the Employer appears as amended at hearing.

[2] The Employer and Petitioner filed post-hearing briefs that were duly considered. The hearing officer's rulings were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[3] The parties stipulated at the hearing that this is an appropriate unit.

DECISION SUMMARY

The issue presented at the hearing was whether Eddie LeMay (shop foreman), Curt Knull (sheet metal lead person), and/or Kevin Hirsch (electrical lead person) are supervisors within the meaning of Section 2(11) of the Act. The Employer contends that LeMay is a supervisor, but Knull and Hirsch are not. The Petitioner contends LeMay, Knull and Hirsch are not supervisors; but, if LeMay is found to be a supervisor, they all must be found to be supervisors, because they have the same authority and responsibilities. Based on the record, and for the reasons set forth below, I find only LeMay to be a supervisor within the meaning of Section 2(11) of the Act.

BACKGROUND

The Employer is engaged in the fabrication and manufacture of heating ventilation and air conditioning equipment at its East Troy, Wisconsin facility. For the purpose of this decision, the facility is divided into three departments: sheet metal, shop (welding and fabrication), and electrical. These departments are headed by Curt Knull, Eddie LeMay, and Kevin Hirsch, respectively. There are approximately 16 production employees who work at this facility. The Employer's "management team" includes Dick and Bill Peitz (owners), John McGinnis (Vice President), and Curt Schultz (Production Manager).

In January 2001, it was announced to the employees during a lunch meeting that LeMay was assuming the position of shop foreman. As shop foreman, LeMay oversees all the employees in the shop and directs the day-to-day operations, in addition to performing fabricating, welding, and assembly work. He also has been involved in certain personnel decisions.

In July 2002, the Employer hired Curt Schultz to be the new Production Manager. Schultz assumed certain responsibilities previously held by LeMay, including reporting to Bill

Peitz on production matters and inspecting the delivery trucks. Outside of these changes, however, LeMay has the same responsibilities and retains the same authority.

ANALYSIS

A. Legal Principles (Supervisory Status)

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor…." The term "supervisor" is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving that an individual is a statutory supervisor rests with the party asserting supervisory status. ***NLRB v. Kentucky River Community Care, Inc.***, 532 U.S. 706 (2001). The three-part test for determining supervisory status is whether: (1) the individuals have the authority to engage in any one of the twelve functions listed in Section 2(11) of the Act; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement; and (3) their authority is held in the interest of the employer. *Id*.

The Board has cautioned that the supervisory exemption should not be construed too broadly because the result of such a construction would be to remove individuals from the protection of the Act. ***Training School at Vineland***, 332 NLRB No. 152 (2000). The burden of proof, therefore, is a heavy one. See ***Franklin Hospital Medical Center d/b/a Franklin Home Health Agency***, 337 NLRB No. 132 (2002), slip op. at 8. The Board reviews the facts in each case in order to differentiate between "the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact." ***Providence Alaska Medical Center***, 320

NLRB 717, 725 (1996). The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*

B. Eddie LeMay

The Employer contends that LeMay is a supervisor because he has the authority to engage in or effectively recommend Section 2(11) indicia. The Petitioner asserts LeMay is not a supervisor because he lacks the ability to exercise independent judgment, and the instances in which he has exercised such judgment are isolated and insufficient to confer supervisory status.[4]

For the reasons set forth below, I find that LeMay is a supervisor under the Act.

1. *Hiring*

LeMay testified he has the authority to make hiring recommendations, but added that he has never effectively recommended anyone for hire. Possession of authority consistent with the indicia of Section 2(11) is sufficient to establish supervisory status, even if the individual supervisor has not exercised that authority. See ***Fred Meyer Alaska, Inc.,*** 334 NLRB No. 94 (2001).

Furthermore, the record evidence establishes that LeMay did effectively recommend at least one employee (Randolph Engel) for hire as a permanent employee. Engel was an Argus temporary employee that the Employer hired as a permanent employee in May 2001, after LeMay gave him a positive evaluation. Although Section 2(11) does not include "evaluate" in its enumeration of supervisory authority, an evaluation can be evidence of supervisory authority if it directly affects the wages and/or job status of the employee being evaluated. See ***Harborside Healthcare, Inc.***, 330 NLRB 1334 (2000). LeMay testified he was asked to

[4] Moreover, the Petitioner contends that any supervisory authority that LeMay had has since been transferred to the recently hired Production Manager (Curt Schultz). The record does not support this contention. LeMay was never relieved of his other responsibilities or authority. In fact, LeMay testified that he retains the same authority that he had prior to Schultz's hiring.

complete an evaluation form on Engel at the end of Engel's assignment as a temporary employee. LeMay completed the evaluation based on his observations of Engel's job performance. McGinnis testified that the Employer hired Engel based on LeMay's evaluation. Based on these facts, I find that the Employer conducted no "independent investigation" before offering Engel a permanent position; it simply deferred to LeMay's experience and judgment to evaluate and determine if Engel could perform the work. See ***ITT Lighting Fixtures***, 265 NLRB 1480, 1481 (1982).

The Petitioner points to the Employer's decision not to follow LeMay's recommendation to hire his son as evidence that LeMay cannot effectively make hiring recommendations.[5] The record evidence, however, establishes that LeMay's son had previously worked for the Employer and did not perform well, and that was the reason the Employer decided not to follow LeMay's recommendation.

2. *Discharge*

LeMay also testified that he has the authority to discharge employees. The record evidence also supports the conclusion that he has the authority to effectively recommend an employee's discharge. LeMay testified that he suggested to Dick Peitz, Bill Peitz and John McGinnis that one employee (Kevin Muhlenbach) be discharged because of his poor attitude. Although the Employer did not discharge Muhlenbach, it did take action based on LeMay's expressed concerns. It transferred Muhlenbach out of LeMay's department to the electrical department.

[5] The Petitioner actually contends that the Employer rejected LeMay's recommendations that it hire his son, his brother and his friend. The evidence in the record, however, is limited to the Employer's decision not to hire LeMay's son.

Furthermore, LeMay did effectively recommend the discharge of Perry Whitliff (former electrical lead person). Although LeMay testified that he was one of many who wanted Whitliff discharged, McGinnis testified that the Employer terminated Whitliff based on LeMay's recommendation.

3. *Discipline*

The Employer contends that LeMay has the authority to issue or effectively recommend the issuance of discipline. LeMay has issued two written warnings (Frank Norton and Joe Stoddard), but both were at the instruction of one of his supervisors. LeMay also has issued verbal warnings to employees. However, these warnings have no clear connection to any other disciplinary measures or any progressive disciplinary system. There is no evidence that these disciplinary warnings affect the employee's wages and/or job status. This authority, therefore, is nothing more than documenting and/or reporting infractions. See ***Willamette Industries, Inc.***, 336 NLRB No. 59 (2001) and ***Ken-Crest Services***, 335 NLRB No. 63 (2001).

4. *Reward*

The record evidence does reflect that LeMay has the authority to recommend pay increases and has input on the distribution of bonuses. McGinnis testified that on several occasions LeMay has come to his office to recommend certain employees for pay increases. McGinnis stated that the two would discuss the matter, and in most instances, he would follow LeMay's recommendation. McGinnis further testified that often in those instances in which the Employer does not follow LeMay's recommendation, it was a timing issue where the Company needed to wait because there is temporary lull in business.

Additionally, in spring 2002, the Employer gave LeMay $1200-$1400 of bonus money to distribute to the employees at the facility, at his discretion. LeMay met with the employees and

they decided everyone should get the same amount, with the two higher performing employees receiving slightly more. Although LeMay sought and followed the input of the employees in how to distribute the bonus money, the fact remains that the management team gave him the money and he distributed the money as he saw fit.

5. *Lay Off*

The record also reflects that LeMay has the authority to effectively recommend individuals for layoff. In January and February 2002, the Employer experienced a slow-down in business and was forced to lay off certain employees. The Employer asked LeMay for his input on who should be laid off. LeMay offered his input, and the Employer followed LeMay's recommendations when making its decisions.

6. *Assign and Direct Work*

The record reflects that LeMay has the ability to direct employees work and make job assignments. There is no dispute that LeMay directs the work of the employees in the shop department, and Hirsch and Knull direct the work of the employees in their departments. But LeMay also can give out job assignments to employees in the other departments. Hirsch testified that LeMay has given him job assignments and tells him "what specific areas we need to concentrate on whether there are things that we need to have finished up for shipping or things that are coming down the line in the future." McGinnis and Hirsch both testified that LeMay also has the authority to redirect or reprioritize duties.

7. *Secondary Indicia*

In borderline supervisory cases, the Board looks to well-established secondary indicia, including the individuals' job title or designation as a supervisor, attendance at supervisory meetings, job responsibilities, authority to grant time off, etc., whether the individual possess a

status separate and apart from that of rank-and-file employees. See ***NLRB v. Chicago Metallic Corp***., 794 F.2d 531 (9th Cir. 1986); ***Monarch Federal Savings & Loan Assn***., 237 NLRB 844 (1978); and ***Flex-Van Service Center***, 228 NLRB 956 (1977).

LeMay is the shop foreman, whereas Knull and Hirsch are lead persons. In fact, Hirsch testified that he views LeMay as his supervisor. Additionally, LeMay also was given a dollar an hour raise when he became shop foreman, Knull and Hirsch were not. The Employer also gave LeMay business cards that identify him as shop foreman. There only are three other production employees with business cards, including Knull and Hirsch, and their cards merely identify them as "members of the production team." Finally, LeMay possesses the authority to grant and deny requests for vacation time. Contrary to the Petitioner's contention, this does not merely involve rubber-stamping the employee's requests. LeMay has to ensure that the facility is adequately staffed.

C. Kevin Hirsch and Curt Knull

The Petitioner contends that if LeMay is found to be a supervisor, Hirsch and Knull also must be found to be supervisors because they possess identical authority. The record does not support this contention. Hirsch testified that, unlike LeMay, he and Knull do not have the authority to hire, fire or discipline. Similarly, there is no evidence that Hirsch and Knull have recommended anyone for wage increases. There also is no evidence that Hirsch and Knull were involved in the layoff decisions earlier this year.

The Petitioner contends that Hirsch and Knull have that same authority as LeMay to direct or assign work. As the more senior employees, Hirsch and Knull do direct the employees within their departments, but Hirsch testified that he gets his instructions from LeMay. As for discipline, Knull has issued one written warning, but there is no evidence that this warning

affected the employee's wages and/or job status. The same can be said for any verbal reprimands Knull or Hirsch may have issued.

The Petitioner also points to the fact that Knull was responsible for evaluating Kyle Datka, a student employee. Knull completed evaluation forms sent from Datka's school concerning Datka's performance. There is no evidence that these evaluations ever affected Datka's wages or job status. Furthermore, Datka testified that he viewed LeMay as the supervisor, not Knull. He testified that Knull directed him to LeMay when he wanted to request time off from work. Knull and Hirsch do not have the authority to grant time off from work.

Based on these factors, the record simply does not reflect that Hirsch and Knull have supervisory authority.

CONCLUSION

Based on the foregoing, I find that LeMay qualifies as a statutory supervisor, but Hirsch and Knull do not. Therefore, Hirsch and Knull are appropriately included in the bargaining unit described above.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the

United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Sheet Metal Workers International Association, Local #18, AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before September 20, 2002.** No extension of time to file this list shall be granted except in extraordinary

circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by September 27, 2002.**

Signed at Milwaukee, Wisconsin on this 13th day of September 2002.

/s/ Philip E. Bloedorn

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